SUPREME COURT, U. S.

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JOHN F. DAVIS, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 451

AMES NOWELL,

Petitioner,

vs.

MARGUERITE LOVELETT NOWELL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

Petitioner prays that a writ of certiorari issue to review the order of the Supreme Court of Connecticut entered in the above-entitled action on May 10th, 1967.

Opinions Below

The order of the Supreme Court of Connecticut entered on May 10th, 1967 is reported in 229 Atl. 2d 701 and is printed as Appendix A hereto. The orders of the Superior Court of Connecticut entered on June 22nd, 1966 and March 17th, 1967 are unreported and appear in the record, pages 49 and 62. No opinion was written by either court.

The judgment of divorce of the Domestic Relations Court No. Two, of Dallas County, Texas, entered on December 22nd, 1965 in favor of the Petitioner in an action between the parties hereto is unreported and is printed as Appendix B hereto.

The opinion of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, delivered on October 28th, 1966, affirming the judgment of divorce, is reported in 408 S.W. 2d 550 and is printed as Appendix C hereto.

Jurisdiction

The order of the Supreme Court of Connecticut sought to be reviewed was entered on May 10th, 1967. It is a final order dismissing the appeal taken by the Petitioner to that court from a judgment of legal separation granted by the Superior Court in favor of the Respondent on April 22nd, 1966, after the entry of the Texas judgment of divorce dissolving the marriage of the parties, unless on or before July 1st, 1967, the Petitioner complies with the order of the Superior Court of June 22nd, 1966, requiring him to pay to the Respondent the sum of $6,000.00 as counsel fees on the appeal, which appeal also includes an appeal from the latter order. By an order entered on June 26th, 1967, the Supreme Court of Connecticut deferred the effective date of the dismissal to October 3rd, 1967.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

Questions Presented

The questions presented for review are:

1. Whether the order of the Supreme Court of Connecticut entered on May 10th, 1967, over the timely objections of the Petitioner, fails to give to the judgment of divorce of Domestic Relations Court No. Two, of Dallas County, Texas, entered on December 22nd, 1965, dissolving the marriage of the parties, full faith and credit contrary to Article IV, Section 1, of the Constitution of the United States and the statute of Congress implementing the same, 28 U.S.C. Sec. 1738.

2. Whether the order of the Supreme Court of Connecticut entered on May 10th, 1967, dismissing the appeal taken by the Petitioner to that court from a judgment of legal separation unless he complies with an order of the Superior Court requiring the Petitioner to pay to the Respondent $6,000.00 as counsel fees, where the appeal also includes an appeal from the latter order, deprives the Petitioner of a right of defense and denies to him due process of law contrary to the Fourteenth Amendment to the Constitution of the United States.

3. Whether the order of the Supreme Court of Connecticut entered on May 10th, 1967, denies to the Petitioner, a citizen of the State of Texas in whose favor a judgment of absolute divorce was rendered there after a contested trial, the privileges and immunities of citizens of the State of Connecticut contrary to Article IV, Section 2, of the Constitution of the United States and the equal protection of the

laws contrary to the Fourteenth Amendment thereof, where it appears that a male citizen of Connecticut in whose favor a judgment of absolute divorce is rendered in that state is not required thereafter to pay to the woman so divorced sums of money as counsel fees to enable her to maintain against him an action for a legal separation.

Constitutional Provisions and Statutes Involved

This petition involves Article IV, Sections 1 and 2, of the Constitution of the United States, and the due process and equal protection of the laws provision of the Fourteenth Amendment thereto and 28 U.S.C. Section 1738.

The only state statute involved is Section 46-29 of the General Statutes of Connecticut, Revision of 1958, Vol. VIII, pp. 149-150.

The constitutional provisions and statutes are printed in pertinent part in Appendix D hereto.

Statement of the Case

Ames Nowell, the Petitioner, and Marguerite Lovelett Nowell, the Respondent, were married on April 6th, 1957, and resided in the State of New York until the end of 1959. They then moved to Darien, Connecticut, where the Petitioner bought a house in their joint names in which they made their abode. In the latter part of 1962 the Petitioner, due to conduct of the Respondent amounting to cruelty and abandon-

ment (4a-5a),[1] left Connecticut and has never returned thereto to live.

On December 2nd, 1962, after the Petitioner ceased to live in Connecticut, the Respondent commenced in the Superior Court of that state an action against the Petitioner for a divorce (R 1-2).[2] A number of months later the Respondent, after changing attorneys, amended her complaint by dropping the claim for a divorce and substituting therefor a count for a legal separation and a count for equitable support (14a, R. 9). The case was referred to a state referee to hear and report. An order was made directing the Petitioner to pay to the Respondent the sum of $1,650.00 per month as alimony *pendente lite,* which he paid through December, 1965 (15a).

In the meantime in February, 1964, the Petitioner established his residence and domicile in Dallas County, State of Texas. On March 15th, 1965, after having resided in Texas more than a year, the Petitioner filed in the Domestic Relations Court No. Two,[3] Dallas County, a petition against the Respondent for a divorce (16a, 25a-26a). After process was served upon the Respondent in Connecticut, the Domestic Relations Court issued an order on September 7th, 1965, restraining the Respondent from taking any action to interfere with the prosecution of the divorce action, which order was served upon the Respondent in the forenoon of September 9th, 1965. In the afternoon of the same day

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[1] "a" citations refer to the appendices hereto.

[2] "R" citations refer to the record in support of the instant petition.

[3] A court of general jurisdiction for cases of domestic relations.

the Respondent hurriedly obtained ex parte from a judge of the Superior Court in Connecticut in the action for a legal separation a temporary order purporting to enjoin the Petitioner from prosecuting the Texas action for divorce (16a). The order was issued without notice to the Petitioner and without a hearing of any kind (23a). It was based upon a petition which implied contrary to fact that the Petitioner was then a resident of Connecticut and that the Respondent did not intend to appear in and resist the action for divorce. A copy of such petition appears in the record filed in this Court in connection with the Respondent's petition for a writ of certiorari to the Court of Civil Appeals of Texas, No. 199, October Term, 1967.

Thereafter the Respondent voluntarily appeared in the Texas divorce action, submitted to the jurisdiction of the court there, and actively contested all of the issues, including those relating to grounds of divorce and the ex parte temporary injunctive order of the Connecticut court. The facts regarding the Respondent's appearance and participation in the divorce action are set forth in detail in this Petitioner's brief in opposition to this Respondent's petition for a writ of certiorari to the Court of Civil Appeals of Texas, heretofore filed in this Court and being numbered 199 in the October Term, 1967.

In the Texas action the Respondent attacked the Petitioner's allegation of residence in that state and the jurisdiction of the trial court there over him and the subject matter, urged the ex parte injunctive order of the Connecticut court as a ground for abating the action, denied the Petitioner's allegations of grounds for divorce and pleaded defenses of recrimination and

condonation, attacked a pre-nuptial property agreement between the parties and sought to have it declared invalid, alleged the existence of community property, demanded a trial by jury, demanded that the Petitioner be required to pay to the Respondent a reasonable fee for her attorneys, appeared and testified at the trial and called witnesses who testified thereat, consented that the issues relating to the pre-nuptial agreement and property rights be determined by the court alone, and approved the form of the judgment entered after the trial.[4]

The judgment of divorce entered after the trial of the Texas action adjudged the Respondent guilty of "excesses, cruel treatment, or outrages" which rendered the further living together of the parties insupportable and of abandoning the Petitioner without justification (4a-5a). It expressly dissolved the bonds of matrimony between the parties and restored them to the status of single persons (5a-6a). It resolved the issues relating to the pre-nuptial agreement and said property rights (6a-11a). The judgment ordered the Petitioner to pay to the Respondent's attorneys, in full satisfaction of his obligation for counsel fees in the action, the sum of $6,000.00, which sum the Petitioner has paid in full (11a). Finally, the judgment ordered, adjudged and decreed that "any and all relief not expressly granted herein to either of the parties is expressly denied" (12a).

The Respondent appealed from said judgment of divorce to the Court of Civil Appeals of Texas, which unanimously affirmed the judgment in an opinion re-

[4] See "Brief in Opposition to Petition for Writ of Certiorari" in *Nowell* v. *Nowell*, No. 199, October Term, 1967, pp. 2-6, 8-12.

ported in 408 S.W. 2d 550 (1966). Thereafter the Respondent filed in the Supreme Court of Texas, the court of last resort in that state, an application for a writ of error to review said affirmance, which application was dismissed (R 79-80). On May 26th, 1967, the Respondent filed in the Supreme Court of the United States said petition for a writ of certiorari to review the decision of the Court of Civil Appeals affirming the judgment of divorce, No. 199, October Term, 1967.

Assertion of the Federal Questions in the Courts Below

After the entry of the judgment of divorce in the Texas court, the Petitioner submitted to the Connecticut courts an exemplified record of the judgment of divorce and sought relief from further prosecution of the action there for a legal separation. He also submitted to those courts memoranda citing decisions of the Supreme Court of the United States showing that the judgment was and is entitled to full faith and credit. The Connecticut courts not only refused to accord full faith and credit to the sister state judgment but repeatedly brushed aside the record of the judgment and permitted the Respondent to proceed with the action for a legal separation as though the judgment of divorce was never entered. Specific instances of such rulings relevant to the instant petition are briefly described below.

(1) In January, 1966, the Petitioner filed in the Superior Court of Connecticut a motion, with an exemplified copy of the Texas judgment, to dismiss the action for a legal separation or to enjoin or stay

further prosecution of the same, on the ground the judgment of divorce was entitled to full faith and credit as a dissolution of the marriage of the parties and as an adjudication of the issues (R 25). The Petitioner submitted in support of the motion a memorandum of law printed as Appendix E hereto.[5] The motion was denied *in toto* (R 26).

(2) In January, 1966, the Petitioner filed in the Superior Court of Connecticut a motion, with an exemplified copy of the Texas judgment of divorce, for permission to amend his answer in the action for a legal separation so as to plead the judgment as a defense to the action (R 39-40). The motion was denied.

(3) On April 22, 1966, when an exemplified record of the Texas judgment of divorce dissolving the marriage of the parties was on file in the action for a legal separation, the Superior Court granted a motion of the Respondent for a judgment of legal separation. On June 6th, 1966, the Petitioner duly filed an appeal from the judgment so granted, together with an assignment of errors, to the Supreme Court of Connecticut (R 41-43, 45).

(4) On June 13th, 1966, the Respondent filed in said Superior Court a motion for an order requiring the Petitioner to pay to the Respondent a counsel fee and expenses on said appeal. The Petitioner opposed the motion on the ground the Texas judgment of divorce dissolved the marriage of the parties and was entitled to full faith and credit (R 52). His opposition was overruled and the motion was granted by an

[5] This memorandum is not included in the record because the original is missing from the clerk's files.

order dated June 22nd, 1966, which directed the Petitioner to pay "forthwith" to the Respondent the sum of $6,000.00 (R 49).

(5) On June 29th, 1966, the Petitioner amended his assignment of errors on his appeal from the purported judgment of legal separation so as to assign error on constitutional grounds for the entering of the order of June 22nd, 1966, directing payment of $6,000.00 as counsel fees (R 53-54). On August 4th, 1966, the Respondent filed a motion to terminate the stay of such order resulting from the assignment of error, which motion was heard on December 7th, 1966 (R 55). The Petitioner opposed the motion on the grounds that the Texas judgment of divorce dissolved the marriage of the parties and was entitled to full faith and credit and that the judgment of divorce had been affirmed by the Court of Civil Appeals of Texas (R 58). The opposition was overruled and the motion was granted (R 56).

(6) On December 10th, 1966, the Petitioner filed a motion addressed to the Supreme Court of Connecticut for a review of the order terminating the stay of the order of June 22nd, 1966, directing Petitioner to pay $6,000.00 as fees (R 59). The motion for review was based upon the judgment of divorce and the decision affirming the same. That motion was denied (R 60, reverse side).

(7) On January 28th, 1967, the Respondent filed a motion to adjudge the Petitioner in contempt for failure to comply with the order of June 22nd, 1966, directing him to pay $6,000.00, which motion was heard on March 17th, 1967 (R 61-62). The Petitioner

opposed the motion on the grounds that the Texas judgment of divorce dissolved the marriage of the parties, that the judgment had been affirmed by the Texas Court of Civil Appeals, that the Respondent's petition to the Supreme Court of Texas for a writ of error had been dismissed, and that said judicial proceedings were entitled to full faith and credit (R 63-64). All of the grounds of opposition were summarily overruled and the motion was granted. Thereupon the Petitioner amended his assignment of errors on the appeal from the purported judgment of legal separation to claim error for the making of the adjudication of contempt (R 81).

(8) On April 6th, 1967, the Respondent filed a motion, addressed to the Supreme Court of Connecticut, to dismiss the Petitioner's appeal to that court from the purported judgment of legal separation, on the grounds the Petitioner had failed to comply with the appealed order of June 22nd, 1966, requiring him to pay to the Respondent $6,000.00 as fees, and that he had been adjudged in contempt for failing to pay by the appealed order of March 17th, 1967 (R 83). The Petitioner opposed the motion to dismiss by memoranda and orally on the grounds that the Texas judgment of divorce and the decision affirming the same were and are entitled to full faith and credit in Connecticut, that the orders of June 22nd, 1966 and March 17th, 1967 were in violation of the full faith and credit and equal protection of laws provision of the Constitution of the United States and that dismissal of the appeal would deny to the Petitioner a basic right of defense and due process of law (43a-54a). By the order of May 10th, 1967, the Supreme Court of

Connecticut overruled all of the grounds of opposition and granted the motion to dismiss unless on or before July 1st, 1967, the Petitioner complies with the appealed order of June 22nd, 1966 (1a, R 96). The effective date of the order was later deferred to October 3rd, 1967.

The Supreme Court of Connecticut neither provided for nor contemplated any further consideration of the Texas judgment of divorce as a defense or bar to the motion for the order of June 22nd, 1966, directing the Petitioner to pay the sum of $6,000.00 as fees, or the motion for the order of March 17th, 1967, adjudging the Petitioner in contempt for failing to pay such sum. Therefore the order of dismissal is necessarily a final order.

Reasons for Granting the Writ

There are three grounds on which the Petitioner urges that a writ issue to review the order of the Supreme Court of Connecticut dismissing his appeal to that court. The first ground is that the dismissal of the Petitioner's appeal denies full faith and credit to the Texas judgment of divorce and the decision of the Texas Court of Civil Appeals affirming the judgment, in violation of Article IV, Section 1, of the Constitution of the United States and 28 U.S.C. Sec. 1738. The second ground is that the order of dismissal deprives the Petitioner of all defenses to the orders of the Superior Court of June 22nd, 1966 and March 17th, 1967, and of any opportunity to obtain an appellate review of the purported judgment of legal separation, and thus deprives the Petitioner of due process of law contrary to the Fourteenth Amendment. The third

ground is that the order of dismissal denies to the Petitioner the privileges, immunities and equal protection of the laws guaranteed to citizens of the several states by the Constitution. Each of these grounds is discussed below.

I

The Order Dismissing the Petitioner's Appeal Denies Full Faith and Credit to the Texas Judgment of Divorce.

Article IV, Section 1, of the Constitution of the United States provides that, "Full Faith and Credit shall be given in each State to the Public Acts, Records and Judicial Proceedings of every other State", and authorizes the Congress to prescribe the manner in which such acts, records and proceedings may be proved "and the Effect thereof". By statute Congress has provided that such judicial proceedings "shall have the same faith and credit in every court within the United States * * * as they have by law or usage in the courts of such state * * * from which they are taken" (28 U.S.C. Sec. 1738).

In many decisions this Court has held that the full faith and credit provision and the implementing statute apply according to their terms to judgments of divorce. Under those decisions the law is well settled that a judgment of divorce granted in one state on the petition of one party to a marriage and the appearance or participation in the action by the other party thereto must be given full faith and credit in the courts of other states. *Sherrer* v. *Sherrer,* 334 U.S. 343 (1948); *Coe* v. *Coe,* 334 U.S. 378 (1948); *Johnson* v.

Muelberger, 340 U.S. 581 (1951); *Cook* v. *Cook,* 342 U.S. 126 (1951). In the *Johnson* case this Court said (p. 587):

> "It is clear from the foregoing that, under our decisions, a state by virtue of the clause must give full faith and credit to an out-of-state divorce by barring either party to that divorce who has been personally served or who has entered a personal appearance from collaterally attacking the decree. Such an attack is barred where the party attacking would not be permitted to make a collateral attack in the courts of the granting state."

Such a judgment of divorce is entitled to full faith and credit as to all questions of jurisdiction over the person and subject matter where it appears that those questions were litigated and determined in the court which rendered the judgment. *Davis* v. *Davis,* 305 U.S. 32 (1938); *Johnson* v. *Muelberger,* 340 U.S. 581, 585 (1951); *Cook* v. *Cook,* 342 U.S. 126, 127 (1951). In *Durfee* v. *Duke,* 375 U.S. 106 (1963), this Court said (p. 111):

> "From these decisions there emerges the general rule that a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment."

And further (p. 113):

> "The reasons for such a rule are apparent. In the words of the Court's opinion in *Stoll* v. *Gottlieb,* supra, 'We see no reason why a court, in the

> absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation. . . . Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation.' "

Equally well settled is the rule that a judgment of a court of one state must be given in the courts of other states the same faith, credit and effect to which the judment is entitled in the state where it was rendered. 28 U.S.C. Sec. 1738; *Johnson* v. *Muelberger,* 340 U.S. 581, 584 (1951); *Aldrich* v. *Aldrich,* 378 U.S. 540, 543 (1964); *Simons* v. *Miami Beach First National Bank,* 381 U.S. 81 (1965). In the *Johnson* case this Court said (p. 584):

> "From judicial experience with and interpretation of the clause, there has emerged the succinct conclusion that the Framers intended it to help weld the independent states into a nation by giving judgments within the jurisdiction of the rendering state the same faith and credit in sister states as they have in the state of the original forum. The faith and credit given is not to be niggardly but generous, full."

The faith, credit and effect which the Nowell judgment of divorce has had and now has in the State of Texas, where it was rendered, are clear and have never been questioned. There the judgment has been and is

entitled to full faith and credit as between the parties thereto and immune to collateral attack by them. It adjudged the Respondent guilty of cruelty and abandonment, severed the marital ties between the parties, restored to each of them the status of a single person, and adjudicated their property rights (4a-11a). It relieved the petitioner of any liability to the Respondent for support or counsel fees except as stated in the judgment (11a-12a).

Unquestionably the Supreme Court of Connecticut, in entering the order of dismissal of May 10th, 1967, and the Superior Court there, in entering the orders of June 22nd, 1966 and March 17th, 1967, enforced by the dismissal, failed and refused to accord full faith and credit to the Texas judgment of divorce. This clearly appears from the following analysis.

(a) Since in the sister state where the judgment of divorce was rendered it relieved the Petitioner of all liability to the Respondent for counsel fees except as provided therein, the orders of the Connecticut courts requiring the Petitioner to pay to the Respondent $6,000.00 in fees necessarily deny full faith and credit to the judgment.

(b) Since the Texas judgment of divorce adjudicated the issues between the parties, including an alleged issue based on the ex parte Connecticut injunctive order, the orders of the Connecticut courts requiring the Petitioner to pay $6,000.00 to enable the Respondent to relitigate the same issues in that state necessarily deny full faith and credit to the judgment of divorce.

(c) The courts of Connecticut, in entering the order of dismissal and the orders enforced thereby, treated the Respondent herein as having the status of wife of the Petitioner and as having standing to maintain against the Petitioner an action for a legal separation. In doing so the courts completely disregarded the sister state judgment of divorce and denied full faith and credit thereto. Section 46-29 of the General Statutes of Connecticut, which governs actions there for legal separation, presupposes a subsisting marriage. In *Smith* v. *Smith,* 150 Conn. 15, 183 A. 2d 848, 852 (1962), the Supreme Court of Connecticut said (p. 23):

> "However, it would be difficult to see under what theory a woman so divorced could thereafter successfully pursue to judgment an action for a legal separation under General Statutes Section 46-29, which on its face presupposes a subsisting marriage. See *Kovats* v. *Kovats,* 144 Conn. 579, 581, 135 A. 2d 903; *Mazzei* v. *Cantales,* 142 Conn. 173, 178, 112 A. 2d 205; *Hamilton* v. *Hamilton,* 113 Conn. 306, 310, 155 A. 217; *Lynn* v. *Lynn,* 302 N.Y. 193, 203, 97 N.E. 2d 748; notes, 166 A. L.R. 1004, 1021; 28 A. L.R. 2d 1346, 1352."

(d) No statute or rule of case law of Connecticut authorizes its courts to order a man, in whose favor a court of competent jurisdiction of a sister state has duly rendered in a contested action and for cause a judgment of absolute divorce, to pay thereafter to the woman so divorced for her fault sums of money as support or counsel fees.

> Therefore, the Connecticut order of May 10th, 1967, dismissing the Petitioner's appeal unless he pays to the Respondent $6,000.00 in fees, denies full faith and credit to the Texas judgment of divorce.

Manifestly the ex parte temporary injunctive order, issued in Connecticut prior to the Respondent's voluntary appearance and litigation of the issues in the Texas divorce action, afforded no justification for the refusals of the Connecticut courts to accord full faith and credit to the judgment entered in the Texas action. In that action the Respondent pleaded the injunctive order, raised issues regarding its effect, and litigated such issues. Both the Texas trial court and the Texas Court of Civil Appeals considered and overruled the contentions based on the injunctive order (13a-14a, 23a-24a). Since in the Texas action the Respondent put in issue and had a trial of the effect of the injunctive order, she was not entitled to a second trial of that issue in Connecticut. "One trial of an issue is enough". See *Treinies* v. *Sunshine Mining Co.,* 308 U.S. 66, 78 (1939); *Johnson* v. *Muelberger,* 340 U.S. 581, 585 (1951); *Durfee* v. *Duke,* 375 U.S. 106, 113 (1963). It is apparent, therefore, that the judgment of divorce was and is entitled to full faith and credit on the alleged issue of the injunctive order as well as on other issues and foreclosed relitigation of such issue in Connecticut. By failing to accept the Texas judgment of divorce as conclusive on the alleged issue of the injunctive order, the Connecticut courts denied full faith and credit to the sister state judgment in violation of the Constitution.

II

The Order Dismissing the Petitioner's Appeal Deprives the Petitioner of the Right to a Hearing on the Merits of His Appeals from the Orders of the Superior Court of June 22nd, 1966 and March 17th, 1967 and the Purported Judgment of Legal Separation Contrary to the Constitution.

The order dismissing the Petitioner's appeal compels the Petitioner to comply with the appealed order of the Superior Court of June 22nd, 1966, directing him to pay "forthwith" to the Respondent the sum of $6,000.00 as fees, and the appealed order of the Superior Court of March 17th, 1967, adjudging him in contempt for failing to pay such sum, before his appeals from those orders are heard.

In effect the dismissal deprives the Petitioner of his right to have his defenses to the appealed orders heard and considered. Since one of the appealed orders requires the Petitioner to pay $6,000.00 as fees and the other adjudges him in contempt, the dismissal deprives him of property and liberty without due process of law in violation of the Fourteenth Amendment.

Moreover, the order of dismissal deprives the Petitioner of his right, given by Connecticut statutes, to a hearing of his appeal from the granting of the purported judgment of legal separation as a penalty for his failure to comply with the appealed orders requiring him to pay $6,000.00 as fees. This is equivalent to striking out a defendant's answer, as such punishment, which has long been forbidden as a violation of due process of law. *Hovey* v. *Elliott,* 167 U.S. 409

(1897); *T. W. Warner Co.* v. *Andrews, et al.;* 5 Conn. Supp. 63, 67-68 (1937); *Brinkley* v. *Brinkley,* 47 N.Y. 40, 49-50 (1871); *Rethorst* v. *Rethorst,* 214 Md. 1, 9-10, 133 A. 2d 101, 106 (1957).

In appealing from the purported judgment of legal separation the Petitioner exercised a right granted by Connecticut law to all persons against whom a judgment has been entered. Connecticut Practice Book, Revision of 1963, Sec. 600. The order of dismissal deprives the Petitioner of the right to a hearing of his appeal from that judgment unless he forfeits to the Respondent $6,000.00 which he does not owe. This is discrimination against the Petitioner in violation of the Constitution. *DuPont* v. *Family Court For New Castle County,* 52 Del. 72, 153 A. 2d 189 (1959). Cf. *Application of Gault,* 87 S. Ct. 1428, 1439-1440, 1459-1460 (1967).

III

The Order Dismissing the Petitioner's Appeal Discriminates Against the Petitioner and Deprives Him of the Equal Protection of the Laws.

Article IV, Section 2, of the Constitution of the United States provides that, "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the Several States", and the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

A citizen of Connecticut who recovers in a Connecticut court a judgment of absolute divorce cannot

thereafter be subjected by the other party to an action for a legal separation. Of course, a husband who recovers such a judgment of divorce may not thereafter be compelled to pay counsel fees for the prosecution of an action for a legal separation against himself. The maintenance of such an action against the party who was successful in such a divorce action would constitute a collateral attack on the judgment of divorce, which the Connecticut statutes and decisions forbid. Gen. Stats. Sec. 46-29; *Salem Park, Inc.* v. *Salem,* 149 Conn. 141, 144, 176 A. 2d 571, 573 (1961); *Hall* v. *Hall,* 91 Conn. 514, 521-524, 100 Atl. 441, 443-445 (1917).

The Petitioner, a citizen of Texas, recovered in a court of competent jurisdiction there, after a contested trial, a judgment of absolute divorce, which judgment has been affirmed on appeal. Under said constitutional provisions this Petitioner was, and is, entitled in Connecticut to the same protection which would be accorded to a citizen of that state who has recovered such a judgment there. Specifically, this Petitioner was, and is, entitled in Connecticut to protection against the prosecution of the action there for a legal separation and from being forced to pay money for the continued prosecution of such action. The refusal of the Connecticut courts to give such protection deprives this Petitioner of the privileges, immunities and equal protection of the laws guaranteed by the Constitution. *Hague* v. *C.I.O.,* 307 U.S. 496, 511 (1939).

In *Marshall* v. *Marshall,* 281 New York App. Div. 976, 120 N.Y.S. 2d 309, 311 (1953), it was held that since a Florida divorce entered on the appearance of

the wife had dissolved the marriage of the parties, the court was powerless to award to her a counsel fee on an appeal from an order cancelling a judgment of legal separation theretofore rendered in her favor. The court said (p. 977):

> "With the marriage tie validly broken by the Florida decree, no power to direct the former husband to pay moneys to the former wife can survive, except by way of the decree itself, or an amendment thereto (*Lynn* v. *Lynn,* 302 N.Y. 193; *Matter of Ensign,* 103 N.Y. 284; *Marshall* v. *Marshall, supra*). Accordingly, the orders directing appellant to pay a counsel fee and expenses were made without jurisdiction and were 'utterly void and unavailable for any purpose, and the want of jurisdiction may always be set up collaterally or otherwise.' (*Kamp* v. *Kamp,* 59 N.Y. 212, 216.) These orders being void, there was no basis for the granting of respondent's motion to punish appellant for contempt of court and for the denial of appellant's cross motion to vacate the orders. (*Kamp* v. *Kamp, supra.*)"

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN T. BONNER,
Attorney for Petitioner,
412 Fifth Street, N.W.,
Washington, D. C.

APPENDIX A

Order of the Supreme Court of Connecticut Entered on May 10, 1967

MARGUERITE L. NOWELL v. AMES NOWELL

The motion by the plaintiff, dated April 5, 1967, to dismiss the appeal from the Superior Court in Fairfield County is granted unless, on or before July 1, 1967, the defendant complies with the order of the Superior Court, dated June 22, 1966, directing the payment of counsel fees to the plaintiff to enable her to defend against this appeal and as to which order the defendant was adjudged in contempt on March 17, 1967.

Edgar W. Bassick III, for the appellee (plaintiff).

John J. Sullivan, with whom was William C. Strong, for the appellant (defendant).

Argued May 2—decided May 10, 1967.

APPENDIX B

Judgment of The Domestic Relations Court No. Two, Dallas County, Texas, Entered on December 22, 1965

No. 65-1768-DR/2

IN THE DOMESTIC RELATIONS COURT NO. TWO
DALLAS COUNTY, TEXAS

AMES NOWELL

v.

MARGUERITE LOVELETT NOWELL

JUDGMENT

ON THE 15th day of December, 1965, came on to be heard the above entitled and numbered cause wherein Ames Nowell, as Plaintiff, is seeking a divorce from Marguerite Lovelett Nowell, as Defendant, together with a recovery by Plaintiff of certain properties in Defendant's possession and a division of the property accumulated during the course of said marriage; and came the parties in person and by and through their respective attorneys, whereupon the Defendant, Marguerite Lovelett Nowell presented to the Court her First Motion For Continuance, the Court having considered same, and having heard argument of counsel relative to same, is of the opinion that the First Motion For Continuance filed by Marguerite Lovelett Nowell should be overruled and, it was accordingly:

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ORDERED, ADJUDGED and DECREED that Defendant's First Motion For Continuance be and the same was in all things overruled.

The Defendant, Marguerite Lovelett Nowell, then presented to the Court Defendant's First Amended Plea In Abatement and the Court having considered same, finds that the Court has heretofore overruled Defendant's motions attacking the jurisdiction of this Court over the Plaintiff and the Defendant and over the subject matter of the litigation, and is of the opinion, as the Court has heretofore found on the 4th day of November, 1965, after a full and complete hearing on October 22, 1965, that Defendant's Plea To The Jurisdiction should be overruled, the Court further finds after due consideration that Defendant's First Amended Plea In Abatement should be and the same is, in all things, overruled and it is therefore:

ORDERED, ADJUDGED and DECREED that Defendant's First Amended Plea In Abatement be and same is in all things overruled.

Thereupon, both parties then announced ready for trial, whereupon a jury having been demanded by the Defendant, Marguerite Lovelett Nowell, and said jury having been called and thereafter impaneled and sworn into office and the First Amended Original Petition of the Plaintiff, filed herein on December 6, 1965, and the Second Amended Original Answer of the Defendant, filed herein on December 14, 1965, both being read to the jury and Court by the parties' respective attorneys and the Court having heard the pleadings and evidence finds that the Court has juris-

diction of the parties and of the subject matter; that Plaintiff's suit has been filed for a period of more than sixty (60) days; and that Plaintiff's First Amended Petition is in due form and contains all of the allegations required by law, and the parties having presented testimony and evidence and after having rested and closed, the case was submitted by the Court to the jury on the 18th day of December, 1965, upon the charge of the Court containing special issues. Said jury of twelve (12) men and women after due deliberation thereafter, submitted the following answers in reply to the special issues as herein set out and the Court after receiving the charge and the answers to the special issues then and there polled each and every juror who stated that the answers to the special issues were true and correct. Said special issues, and the answers thereto, being as follows:

"Special Issue No. 1.

"Do you find from a preponderance of the evidence that the plaintiff, Ames Nowell, has been an actual bonafide inhabitant of the State of Texas for a period of twelve months immediately preceding December 6, 1965?

"Answer: 'Yes' or 'No.' Answer: "Yes"

"Special Issue No. 2.

"Do you find from a preponderance of the evidence that Marguerite Lovelett Nowell has been guilty of excesses, cruel treatment, or outrages, as that term is defined in this charge, towards Ames Nowell?

"Answer: 'Yes' or 'No.' Answer: "Yes"

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"Special Issue No. 3.

"Do you find from a preponderance of the evidence that such excesses, cruel treatment or outrages, if any you have found in answer to Special Issue No. 2, were of such a nature as to render the further living together as husband and wife of Ames Nowell and Marguerite Lovelett Nowell insupportable, as that term is herein defined?

"Answer: 'Yes' or 'No.' Answer: "Yes"

"Special Issue No. 4.

"Do you find from a preponderance of the evidence that Ames Nowell committed acts of excesses, cruel treatment or outrages of the same general kind and character toward Marguerite Lovelett Nowell which provoked the acts, if any, found in Special Issue Number 2?

"Answer: 'Yes' or 'No.' Answer: "No"

"Special Issue No. 5.

Do you find from a preponderance of the evidence that, for a period of three years prior to December 6, 1965, the defendant, Marguerite Lovelett Nowell abandoned the plaintiff, Ames Nowell, as the term abandonment is defined herein?

"Answer: 'Yes' or 'No.' Answer: "Yes"

It is therefore, in accordance with the said jury's findings as set out hereinabove and the findings of the

court, ORDERED, ADJUDGED and DECREED by the Court that Ames Nowell, Plaintiff, be and he is hereby granted a divorce from Marguerite Lovelett Nowell, Defendant, and that the bonds of matrimony heretofore existing between them be, and the same are, hereby dissolved and the parties are respectively restored to the status of single persons.

Further, came the parties, in person, and by stipulation through their respective attorneys of record, and consented that the Court, based upon the pleadings and the evidence, determine the issues raised by the pleadings regarding the Pre-Nuptial Agreement executed by the parties on or about April 3, 1957, and the respective rights of the parties in and to certain items of property acquired during the course of this marriage, which issues by agreement of the parties and their respective counsel, were not submitted to the jury. The Court having considered the pleadings and the evidence and based on the consent of the parties and the agreement of counsel, is of the opinion and hereby Orders, Adjudges and Determines that the Pre-Nuptial Agreement of April 3, 1957, executed by and between Ames Nowell, Plaintiff, and Marguerite Lovelett Nowell, Defendant, is a legal, valid and binding agreement between the parties and has not been revoked or otherwise set aside and that at the time of its execution, same was executed, attested by two witnesses and properly acknowledged in accordance with the law; that the house and lot located at 35 Tokeneke Drive, West, Darien, Connecticut was acquired during the marriage of Plaintiff, Ames Nowell, and Defendant, Marguerite Lovelett Nowell,

and that same should be sold and after the payment of the mortgage indebtedness thereon, the proceeds then divided equally between the parties; that the 1964 Rambler automobile presently in the possession of Plaintiff should be set aside to the Plaintiff as his separate property; that the 1962 Ford Thunderbird automobile presently in the possession of the Defendant should be set aside to the Defendant as her separate property; that Plaintiff is entitled to the possession of the jewelry which is presently in the possession of the Defendant, Marguerite Lovelett Nowell, which belonged to Plaintiff's mother, Anna Lee Ames Nowell, and the Court Orders, Adjudges and Determines that the Plaintiff, Ames Nowell, is entitled to the possession of same and the use of said jewelry for Plaintiff's life and that same should be delivered by Defendant to Plaintiff forthwith; and the Court further finds and determines that the Defendant has no interest therein. The Court further finds and accordingly Orders, Adjudges and Determines that certain items of antique furniture, china, linens, silverware, paintings and other items of personalty located in the house at 35 Tokeneke Drive, West, Darien, Connecticut, is subject to a life estate in Ames Nowell and that said antique furniture, china, linens, silverware, paintings and other items of personalty given and transferred by Plaintiff prior to this marriage to Peregrine White Sanctuary, Inc. belongs to and is the property of the Peregrine White Sanctuary, Inc. and that Plaintiff is entitled to the use of same for life and same should be delivered into possession of Plaintiff forthwith; the Court further finds that the Defendant makes no claim to same and has no interest therein,

and that the other items of furniture in said Darien, Connecticut home belong to and are the separate property of the Defendant. The Court further finds that the Defendant has accumulated a separate estate prior to said marriage which belongs to the Defendant in and near Briarcliff Manor, New York, consisting of approximately eighteen (18) acres, together with improvements thereon, a house located in Southport, Connecticut, certain stocks and securities, all of which is the separate property of the Defendant. The Court further finds that the parties have acquired a 54-foot Constellation Chris-Craft boat presently in the possession of the Plaintiff and that said boat has a reasonable value of $35,000.00 and upon which there exists thereon a mortgage of approximately $80,000.00. In this connection, the Court sets aside said boat to the Plaintiff as his said separate property, and finds that the Defendant shall be released, free and clear of any responsibility or obligation in connection with any mortgage indebtedness thereon. It is therefore, accordingly:

ORDERED, ADJUDGED and DECREED that the Plaintiff, Ames Nowell, is entitled to the use and possession for his life of all the jewelry which belonged to Plaintiff's mother, Anna Lee Ames Nowell, and presently in Defendant's possession, and that the Defendant, Marguerite Lovelett Nowell, forthwith deliver same to Plaintiff, Ames Nowell, same being hereby set aside to Plaintiff.

It is further ORDERED, ADJUDGED and DECREED that the Plaintiff, Ames Nowell, is entitled to the use and possession for his life of all the antique furniture, china, linens, silverware, paintings and other items

of personalty given and transferred prior to marriage to the Peregrine White Sancturay, Inc. and presently in Defendant's possession and that the Defendant, Marguerite Lovelett Nowell, forthwith deliver same to Plaintiff, Ames Nowell, same being hereby set aside to Plaintiff.

It is further ORDERED, ADJUDGED and DECREED that the parties hereto shall forthwith sell the house and lot located at 35 Tokeneke Drive, West, Darien, Connecticut, and that the parties hereto shall thereupon pay the then outstanding mortgage indebtedness and thereafter the net proceeds from said sale be divided equally between Plaintiff, Ames Nowell, and the Defendant, Marguerite Lovelett Nowell.

It is further ORDERED, ADJUDGED and DECREED that the 1964 Rambler automobile in Plaintiff's possession be set aside to Plaintiff as his separate property. It is further ORDERED, ADJUDGED and DECREED that the 1962 Ford Thunderbird automobile in Defendant's possession be set aside to Defendant as her separate property.

It is further ORDERED, ADJUDGED and DECREED that Defendant's estate in and near Briarcliff Manor, New York, consisting of approximately eighteen (18) acres, together with improvements thereon, a house and lot located in Southport, Connecticut, and stocks and other securities in Defendant's name is the separate property of Defendant.

It is further ORDERED, ADJUDGED and DECREED that the 54-foot Constellation Chris-Craft boat presently in Plaintiff's possession, be and same is, set aside to Plaintiff, Ames Nowell, as his separate property

and that Defendant, Marguerite Lovelett Nowell, is and shall be, released from any responsibility or obligation to pay any portion of the mortgage indebtedness upon same and that Plaintiff, Ames Nowell, shall hold said Defendant free and harmless by reason of same mortgage indebtedness.

The Court further finds and it is the order of this Court that the interest in the above-mentioned properties set aside to the Plaintiff, Ames Nowell, is hereby divested out of the Defendant, Marguerite Lovelett Nowell, if any interest therein she has, and vested in Plaintiff, Ames Nowell, as his separate property and estate free and clear of any interest, claim, right or demand by Defendant, and that the property set aside to the Defendant, Marguerite Lovelett Nowell, is hereby divested out of the Plaintiff, Ames Nowell, if any interest therein he has; and vested in the Defendant, Marguerite Lovelett Nowell, as her separate property and estate, free and clear, of any interest, claim, right or demand by Plaintiff.

The Court further finds and determines and accordingly: ORDERS, ADJUDGES and DECREES that any and all clothing and personal effects in the possession of either Plaintiff, Ames Nowell, or Defendant, Marguerite Lovelett Nowell, shall be held and owned by said party as the separate property of said party and that there is no other property, either real or personal, belonging to Plaintiff, Ames Nowell, or the Defendant, Marguerite Lovelett Nowell, requiring adjudication by the Court as between the parties hereto.

Further, the Court ORDERS, ADJUDGES and DECREES that the Plaintiff, Ames Nowell, shall hold Defendant,

Marguerite Lovelett Nowell, free, clear and harmless from any indebtedness contracted by Plaintiff and owed to The National Shawmut Bank of Boston, Massachusetts, any and all debts contracted by Plaintiff and owed to United Boat Company, New York City, any claim presently existing for attorney's fees, contracted by Plaintiff in the approximate sum of $25,000.00 and filed as a lien on the house and lot at 35 Tokeneke Drive, West, Darien, Connecticut, all of which shall be solely the indebtedness of Plaintiff, and further, that Defendant, Marguerite Lovelett Nowell, shall hold Plaintiff, Ames Nowell, free, clear and harmless of the mortgage indebtedness owed on the house and lot owned by Defendant located at Southport, Connecticut, and any other debts contracted by her for her separate property and same shall be solely the indebtedness of Defendant.

The Court further finds that there have been no children born of this marriage and that no children were adopted. The Court further finds that the Defendant is entitled to recover of and receive from the Plaintiff reasonable attorney's fees in the sum of $6,000.00 payable to the Defendant's attorneys of record, Burford, Ryburn & Ford, attorneys for Defendant, Marguerite Lovelett Nowell, which fee shall be paid in installments of $1,000.00 each, the first payment to be February 1, 1966, and a like payment on the first day of each succeeding month thereafter until paid, which sum the Court finds to be a fair and reasonable sum and which shall be in full satisfaction of any obligation of Plaintiff to Defendant's said attorneys in this action, for which let execution issue.

It is further ORDERED, ADJUDGED and DECREED by the Court that any and all relief not expressly granted herein to either of the parties is expressly denied.

Further, all costs incurred in this cause are taxed against the Plaintiff, Ames Nowell.

SIGNED and ENTERED this 22nd day of December, 1965.

ROBERT H. HUGHES
Judge

Domestic Relations Court Number Two,
Dallas County, Texas

Approved as to Form:

Law Offices of William A. McKenzie

By WILLIAM A. McKENZIE
William A. McKenzie
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Attorneys for Defendant,
Marguerite Lovelett Nowell

APPENDIX C

Opinion of the Court of Civil Appeals of the Fifth Supreme Judicial District of Texas, Delivered on October 28, 1966

FROM DOMESTIC RELATIONS COURT No. 2

OF

DALLAS COUNTY, TEXAS

No. 16,800

MARGUERITE LOVELETT NOWELL,

Appellant

VS

AMES NOWELL,

Appellee

Divorce action. Ames Nowell instituted this action in the Domestic Relations Court of Dallas County, Texas against Marguerite Lovelett Nowell in which he sought a divorce and adjudication of property rights. Defendant wife, a resident of the State of Connecticut, was served with citation in that state. Pursuant to Rule 120a, Vernon's Texas Rules of Civil Procedure, defendant filed her motion challenging the jurisdiction of the Texas court on the grounds (a) that she was not a resident of the State of Texas, (b) that the plaintiff was not a bona fide resident of the State of Texas, (c) that there was a prior suit pending in the State of Connecticut, being a suit for legal separation and equitable support involving the same parties and same

subject matter, and (d) that at the time of attempting service upon defendant, plaintiff was under an injunction issued in the Connecticut suit prohibiting him from proceeding with the Texas action. Defendant also filed her plea in abatement asserting the same grounds as were contained in her motion challenging jurisdiction and asking the court to grant comity to Connecticut and the injunctions issued and to dismiss or abate the Texas action. The trial court overruled both pleas and the case proceeded to trial before a court and a jury. Following jury verdict, judgment was entered granting plaintiff husband a divorce from defendant wife and also ordering disposition of certain property of the parties. This appeal follows.

Facts

Ames Nowell and Marguerite Lovelett were married April 6, 1957. In November of 1962 Marguerite Nowell filed suit in the Superior Court of Fairfield County, Connecticut against Ames Nowell seeking a divorce. Ames was served personally in Connecticut. Shortly thereafter Marguerite amended her suit and changed the cause of action from that of divorce to one seeking legal separation and equitable support under the provisions of Section 46-29 of the Connecticut General Statutes, Revision of 1955.*

* "In any case in which a divorce might be decreed, the superior court, on petition of the party who would be entitled to a divorce, may decree a legal separation of the parties, which separation shall have in all respects the effect of a divorce, except that the parties shall not be free to marry any third person and except as hereinafter provided. Upon such petition the procedure shall be the same as in actions for divorce, and the court shall have the same power in

Ames Nowell appeared in person in the Connecticut suit and that court entered an order requiring the husband to pay alimony to the wife in the sum of $1,650 per month. The merits of the Connecticut action had been submitted by the Connecticut court judge to a referee who conducted hearings thereon beginning September 29, 1964.

Ames Nowell left the State of Connecticut and eventually came to Texas and filed an action in the Juvenile Court of Dallas County, Texas seeking an annulment of the marriage. On March 24, 1965 the Connecticut court entered a temporary injunction order forbidding Ames from "either directly or indirectly, personally or by his agents or attorneys from prosecuting, pursuing, proceeding or in any manner whatsoever from taking action in or with regard to a certain lawsuit in the Juvenile Court of Dallas, Dallas County, Texas, * * *." No further action was taken on the annulment suit in Texas.

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all matters relating to temporary and permanent orders for alimony, custody and support of children, and to allowances, as in cases of divorce. The parties to such action may at any time resume marital relations, upon filing with the clerk of the superior court for the county in which the separation was decreed their written declaration of such resumption, signed, acknowledged and witnessed. Such declaration shall be entered upon the docket, under the entries relating to such petition."

Section 46-30 provides:

"At any time after the entry of a decree of legal separation, either party may petition the superior court for the county where such decree was entered for a decree finally dissolving and terminating the marriage and, if the court finds that the parties have not resumed marital relations since the entry of the decree of legal separation, it may enter a decree finally dissolving and terminating the marriage and may affirm or modify any existing orders and may enter any additional orders relating to alimony, custody and support of children and allowances as are usual in divorce cases."

Appendix C

On March 15, 1965 Ames Nowell filed the instant suit for divorce. After service was accomplished in Connecticut Ames Nowell filed an application for, and the Domestic Relations Court of Dallas County, Texas issued on September 7, 1965, an order temporarily restraining Marguerite Nowell from taking any action in her Connecticut suit which might interfere with the divorce suit pending in Texas. Marguerite Nowell was served with notice of said restraining order in the forenoon of September 9, 1965. In the afternoon of the same date, September 9, 1965, Marguerite Nowell obtained a temporary injunction in the Connecticut court against Ames Nowell forbidding him from taking any further action in the divorce case in Texas, or in any other state, pending final disposition of the Connecticut case.

Prior to these proceedings, and on August 24, 1965, the referee had returned to the Connecticut court a report of his findings wherein it was found that Marguerite Nowell was entitled to equitable support.

On September 16, 1965 Marguerite Nowell filed her sworn motion in the Texas suit challenging the jurisdiction of the court over her person in temporary injunction proceedings and in which she specifically pleaded all relevant facts relating to the pending Connecticut suit and the temporary restraining order issued against Ames Nowell in Connecticut. This motion was denied.

On September 24, 1965 Marguerite Nowell filed her sworn motion pursuant to Rule 120a, T.R.C.P., challenging the jurisdiction of the Texas court over her person and setting forth the material facts relating to

the prior suit pending in Connecticut and the injunctions issued therein. This motion was heard by the Texas court on October 22, 1965 and was overruled.

Marguerite Nowell filed a plea in abatement in the Texas action on October 25, 1965, and amended the same on December 8, 1965, in which she set forth specifically and in detail all of the material facts relating to the prior suit pending in Connecticut and the injunction issued against Ames Nowell therein. This plea was heard on December 9, 1965 and overruled.

At the time the Texas court heard the plea to the jurisdiction and pleas in abatement the report of the referee in the Connecticut action had not been acted upon by the judge of the Connecticut court and the Connecticut action was still pending.

The case proceeded to trial in the Texas court on December 15, 1965 and after hearing voluminous testimony the trial court submitted the case to the jury on special issues, all of which were answered favorably to Ames Nowell. Based upon such verdict the trial court entered judgment for divorce in favor of Ames Nowell and also ordered certain disposition of property of the parties.

Opinion

By her first six points of error appellant contends that the trial court erred in overruling her plea to the jurisdiction and also her plea in abatement because at the time of hearing of said motion and plea there was pending in the State of Connecticut a suit previously filed and involving the same parties and

subject matter, as well as anti-suit injunctions issued in the Connecticut court, and that under the doctrine of comity the Texas court should have taken cognizance of the Connecticut action and injunctions and refused to entertain jurisdiction of the controversy.

By these points appellant does not attempt to assert the existence of a prior final judgment of a sister state and thereby invoke the protection of the Full Faith and Credit provision of our Federal Constitution. Instead, she seeks to apply the familiar doctrine of comity.

Comity has frequently been defined as the recognition that one sovereignty allows within its territory to the legislative, executive, or judicial act of another sovereignty, having due regard to the rights of its own citizens. The rationale of the doctrine is founded on mutual interest, conscience and moral necessity to do justice in order that justice may be done in return. 12 TexJur.2d, Conflict of Laws, § 2, p. 304. Comity is not a matter of right. The doctrine does not stand boldly clad in the armor of unyielding obedience but is rather arrayed in vestments of persuasion. Being voluntary and not obligatory, the application of comity vests in the sound discretion of the tribunal of the forum.

The prevailing rule in Texas has been aptly stated in *Mills* v. *Howard,* 228 S.W.2d 906, Civ.App., as follows:

> "While, as we have said, the pendency of a prior suit involving the same parties and subject matter strongly urges the court of the local forum to stay the proceedings pending deter-

> mination of the proir suit, yet the rule is not mandatory upon the Court nor is it a matter of right to the litigant. It is, after all, a matter resting within the sound discretion of the court."

A resolution of the question of abuse of discretion in such a case necessarily demands a close inspection of the two pending actions. To secure the abatement of a subsequent suit because of the pendency of a prior one it is, as a general rule, necessary that the two suits involved in the same cause of action, concern the same subject matter, involve the same issues, and seek the same relief. 1 Tex.Jur.2d § 34, pp. 56-57. "One test to determine whether causes of action are identical is to ascertain whether the parties could obtain all the relief in the prior suit that they would be entitled to in the subsequent action." 1 Tex.Jur.2d, § 35, p. 59. Appellant, while candidly conceding that the action maintained by her in Connecticut is not a divorce action but one for separate maintenance under the Connecticut statute, contends that the parties are identical and that there is such a similarity of issues as to call into play the doctrine of comity. We cannot agree with appellant in this regard. The action pending and relief sought in the Connecticut court were not the same as that in the Texas court.

A very similar situation was presented to the El Paso Court of Civil Appeals in *Perusse* v. *Perusse,* 402 S.W.2d 931 (1966). In that case the parties had been married in New York and the husband moved to Texas and filed an action for divorce in the Texas court. The wife instituted a divorce proceeding in

the circuit court in Maryland wherein she sought a divorce *"a mensa et thoro"* pursuant to the provisions of Art. 16, Sec. 25 of the Annotated Code of Maryland. The wife filed her plea in abatement in the Texas action seeking to have the Texas divorce proceeding abated because of the pendancy of the Maryland proceeding. The plea in abatement was sustained by the District Court and the Court of Civil Appeals, after reviewing the authorities, reversed and rendered the judgment thereby holding that the doctrine of comity should not have been applied under the peculiar facts and circumstances of that case. Since the situation is so similar we quote from the opinion which we feel has application to this action:

> "The record shows that at the time appellant filed his amended petition, which complied then with the residential requirements for a divorce suit in Texas, the appellee had filed for a divorce 'a mensa et thoro' in Maryland which, according to the references in the record here, is actually, viewed from a Texas standpoint, a legal separation and not an absolute divorce. For example, neither party can re-marry, and for other purposes, such as adultery, both parties are considered to be still married. Therefore, the plea in abatement filed attempted to abate a suit in Texas which was for a complete and final divorce, on the basis that a suit for legal separation had been filed in Maryland. It has long been held that a cause may be abated only where both actions or causes of action are the same and ask for the same relief. 1 C.J.S. Abatement and Revival

§ 40; 1 Tex.Jur.2d, Abatement and Revival, § 34; Payton v. Hurst Eye, Ear, Nose & Throat Hosp. & Clinic (Tex.Civ.App.), 318 S.W.2d 726 (reh. den.); Hatten v. City of Houston (Tex.Civ.App.) 373 S.W.2d 525 (err.ref., n.r.e.). A full and complete divorce comparable to that sought by appellant in Texas is described by the Maryland laws as a divorce 'a vinculo matrimonii'. It is clear, therefore, that at the time the court here heard the matters involved, and issued its two orders, that the appellee in the Maryland court had not filed or asked for anything more than a 'bed and board' legal separaion. This, in our opinion, would not suffice to abate the complete divorce decree asked for by appellant. This matter is well set out in 31 A.L.R.2d 442, which states the following at page 447:

> " 'On the other hand, the pendency of action between the same parties for separation on the ground of abandonment and nonsupport was held not to bar an action for absolute divorce in Hall v. Hall (1912) 150 AppDiv 688, 135 NYS 741. The decision was rested on the ground, among others, that "the two actions are brought on different grounds for different relief," the court relying upon Conrad v. Conrad (1908) 124 AppDiv 780, 109 NYS 387, where it was held that it was not proper to unite in the same complaint a cause of action for absolute divorce and one for separation on the ground of abandonment.

> "'That an action for an absolute and one for a limited divorce are based on different causes of action was also intimated in Cook v. Cook (1912) 159 NC 46, 74 SE 639, 40 LRA NS 83, Ann Cas 1914A 1137, infra, § 4, under heading "Where defendant in first action has not asked for affirmative relief."'
>
> "Therefore, it seems clear to us, and we so hold, that at the time the court signed its final order abating the suit in Texas (the date of which was December 10, 1965), there was no suit filed anywhere legally comparable to the one pending in El Paso County."

Appellee places great reliance upon the opinion of the Court of Civil Appeals in *Evans* v. *Evans*, 186 S.W.2d 277 but a close examination of that case clearly illuminates the distinguishing features which render the decision inapplicable here. In that case the husband instituted an action for divorce in the State of Ohio and then moved to Texas where he instituted another suit for divorce, seeking the same relief. Moreover, in the *Evans* case plaintiff left his property in Ohio and had none in Texas at the time he filed the second action. The Texas court held that Evans, having chosen the forum, should have continued to proceed therein to final judgment rather than seek relief in the Texas action. In this suit appellee did not institute the Connecticut action. He came to Texas, as he had a perfect right to do, bringing with him his property, established a residence

here and proceeded to file a suit for a divorce pursuant to Texas law.

Appellant advances the argument that since the appellee husband violated the anti-suit injunctions issued in the Connecticut court that he may not now be protected by Texas law. As stated in the recitation of the facts above, the first anti-suit injunction issued in the Connecticut court was against appellee proceeding any further with the suit he had filed in Texas in the Juvenile Court seeking an annulment. Appellee did not violate this injunction but proceeded no further with the prosecution of the annulment action. The second anti-suit injunction issued in the Connecticut court was granted subsequent to the issuance and service of the Texas anti-suit injunction restraining appellant from proceeding further with interference of the prosecution of the Texas divorce action. Moreover, the record discloses that the Connecticut injunction was issued ex parte with no notice being served upon appellee. Under these circumstances we see no merit in appellant's contention relating to this phase of the case. Moreover, we have heretofore pointed out the dissimilarity of the two actions pending in Connecticut and Texas.

It has often been held to be improper to enjoin a bona fide resident of another state from prosecuting an action for divorce in the state of his residence. *Stultz* v. *Stultz,* 104 A.2d 656; *Brown* v. *Brown,* 93 A.2d 616; *Usen* v. *Usen,* 13 A.2d 738; *Garvin* v. *Garvin,* 96 N.E.2d 721; *Kleinschmidt* v. *Kleinschmidt,* 99 N.E.2d 623; 27 C.J.S., Divorce, p. 690; 128 A.L.R. 1480.

We are convinced, and so hold, that the Texas court did not abuse its discretion in denying appellant her plea to the jurisdiction and plea in abatement. Simply stated, the Connecticut court did not have jurisdiction of these parties in any action for divorce. Appellee had ceased to be a resident of Connecticut for more than a year before he moved to Texas and became a resident of this state. That he had a right to leave Connecticut and move to any state of his choice cannot be denied. Appellee had every right in law to institute and prosecute an action for divorce in accordance with the laws of his new domicile. Appellant's points 1 through 6 inclusive are overruled.

By her points of error 7 through 13 appellant contends that there was no evidence, or that the evidence was wholly insufficient, to establish the necessary residential requirements of appellee in Texas so as to give the trial court jurisdiction over either appellant or appellee. She also contends that the answer of the jury to Special Issue No. 1 to the effect that appellee had established residence in Texas was not supported by the evidence or was contrary to the great weight and preponderance thereof.

In support of these points appellant points to the fact that plaintiff's original petition was filed on March 15, 1965 and that in such petition appellee had alleged that he was a resident of the State of Texas for twelve months and the City of Dallas six months immediately preceding the institution of the suit. Appellant contends that the testimony shows that plaintiff came to Dallas on February 12, 1964 and remained

here for two and a half days before returning to New York. He returned to Dallas in March 1964 and left again in April and did not return until May. He returned to New York in June and did not return to Dallas until March 1965. Appellant contends that appellee spent approximately ten months in New York City during the year 1964 and in New York City for three months in 1965, during which time he stayed in the George Washington Hotel.

As opposed to appellant's contention, appellee contends, and the record demonstrates, that he moved to Texas on February 12, 1964 and rented an apartment, executing a lease for one year. Thereafter he instituted proceedings to transfer a trust of which he was trustee from Boston, Massachusetts to the First National Bank in Dallas. Appellant testified, and such testimony was corroborated by other witnesses, that when he came to Texas he intended to make Texas his permanent residence; that he actually moved his property here, opened a bank account here; qualified to vote here, joined organizations here and did many things demonstrating his bona fide intent to reside in Dallas. He testified that he had reasons for temporary absences from the state, one because of litigation pending against him in Connecticut, it was necessary for him to spend large amounts of time in the vicinity of New York City conferring with attorneys, preparing for court hearings, testifying at hearings, etc.; and secondly, it was necessary that he be in New York City on a number of occasions to receive medical treatment and examinations in connection with a personal injury claim against the City of New York.

Moreover, he testified to necessary trips to New York in connection with his business of writing, teaching and publishing.

Though he filed his original petition for divorce on March 15, 1965 the same was amended on December 6, 1965 and the residential issue, being Special Issue No. 1, was submitted to the jury as to whether or not appellant had been a bona fide inhabitant of the State of Texas for a period of twelve months immediately preceding December 6, 1965. To this the jury answered "Yes".

The trial court correctly limited the special issue regarding residence to the period of one year immediately preceding December 6, 1965, the date of the filing of appellee's amended petition for divorce. *Ingram* v. *Ingram,* Civ.App., 380 S.W.2d 666; *Myers* v. *Myers,* Civ.App., 210 S.W.2d 832; *Coleman* v. *Coleman,* Civ. App., 20 S.W.2d 813; *Bateman* v. *Bateman,* Civ.App., 188 S.W.2d 866; *Whitsett, et al* v. *Whitsett,* Civ.App., 201 S.W.2d 114; 20 Tex.Jur.2d, Divorce and Separation, § 62, p. 407.

The question presented is not one of jurisdiction but relates to the statutory qualifications of a litigant to maintain a suit for divorce. *Aucutt* v. *Aucutt,* 122 Tex. 518, 62 S.W.2d 77, 89 A.L.R. 1198.

In determining the sufficiency of the evidence to support the jury's affirmative answer to Special Issue No. 1 relating to the residential requirement we have carefully considered all of the evidence adduced by both appellant and appellee. *In re King's Estate,* 150 Tex. 662, 244 S.W.2d 660. Having done so, we find that the same is conflicting but such conflict has

been resolved by jury verdict. We cannot say that the answer of the jury is so contrary to the great weight and preponderance of the evidence as to be manifestly wrong or unjust. Accordingly, we cannot disturb the jury verdict nor the action of the trial court in rendering judgment thereon. Appellant's points 7 through 13 are overruled.

Finding no merit in any of appellant's points of error the same are overruled and the judgment of the trial court is affirmed.

AFFIRMED.

WILLIAMS, Associate Justice

DELIVERED:

October 28, 1966.

APPENDIX D

Constitutional Provisions and Statutes Involved

United States Constitution, Article IV

Section 1. Full Faith and Credit shall be given in each State to the Public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Title 28, § 1738 U. S. C.

The records and judicial proceedings of any court of any such State . . ., or copies thereof, shall be proved or admitted in other courts within the United States . . . by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such state . . . from which they are taken.

United States Constitution, Amendment XIV

§1. . . . nor shall any State deprive any person of life, liberty or property, without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws.

General Statutes of Connecticut, Revision of 1958

Sec. 46-29 — *Legal Separation.* In any case in which a divorce might be decreed, the superior court, on petition of the party who would be entitled to a divorce, may decree a legal separation of the parties, which separation shall have in all respects the effect of a divorce, except that the parties shall not thereby be made free to marry any third person and except as hereinafter provided. Upon such petition the procedure shall be the same as in actions for divorce, and the court shall have the same power in all matters relating to temporary and permanent orders for alimony, custody and support of children, and to allowances, as in cases of divorce. The parties to such action may at any time resume marital relations, upon filing with the clerk of the superior court for the county in which the separation was decreed their written declaration of such resumption, signed, acknowledged and witnessed. Such declaration shall be entered upon the docket, under the entries relating to such petition.

APPENDIX E

Memorandum Submitted to the Superior Court of Connecticut

SUPERIOR COURT

FAIRFIELD COUNTY AT BRIDGEPORT

January 20, 1966

No. 118006

MARGUERITE LOVELETT NOWELL

vs.

AMES NOWELL

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OR FOR AN INJUNCTION OR STAY OF PROCEEDINGS

We request that the memorandum submitted in opposition to plaintiff's motion for contempt as well as the instant memorandum be read in support of defendant's motion to dismiss this action or for an injunction or stay of the proceeding.

It is the position of the defendant on the present motion that since plaintiff voluntarily appeared and litigated all of the issues in the Texas action for a divorce, the judgment of divorce rendered in that action on December 22, 1965 is necessarily binding on the plaintiff in this Court, that said judgment dissolved the bonds of matrimony between these parties,

and that the judgment is necessarily a bar to the further prosecution of the instant action for a separation, which is based on the relationship of husband and wife, and that the judgment is the only source of plaintiff's rights against the defendant and of his obligations to her.

I

In addition to the authorities cited in the memorandum in opposition to plaintiff's motion for contempt we call to the attention of the Court the additional decisions hereinafter discussed.

In *Johnson* v. *Muelberger,* 340 U. S. 581 (1951) the Supreme Court, reversing the New York Court of Appeals, held that a Florida decree of divorce entered on the appearance and participation of both parties was entitled to full faith and credit as against a child of one of the parties as well as against the parties to the divorce action. After discussing earlier decisions of the Supreme Court interpreting the Full Faith and Credit clause of the Constitution, the Supreme Court said (Page 587):

> "It is clear from the foregoing that, under our decisions, a state by virtue of the clause must give full faith and credit to an out-of-state divorce by barring either party to that divorce who has been personally served or who has entered a personal appearance from collaterally attacking the decree. Such an attack is barred where the party attacking would not be permitted to make a collateral attack in the courts of the granting state."

Appendix E

In *Durfee* v. *Duke,* 375 U. S. 106 (1963), the Supreme Court held that a Nebraska judgment rendered in an action in which both parties appeared and litigated the issues was entitled to full faith and credit in Missouri even as to the jurisdiction of the Nebraska Court over the subject matter and reversed the lower Courts which had failed to accord full faith and credit to the Nebraska judgment. The Court summarized the law as follows: (pp. 111-114)

P. 111 "However, while it is established that a court in one State, when asked to give effect to the judgment of a court in another State, may constitutionally inquire into the foreign court's jurisdiction to render that judgment, the modern decisions of this Court have carefully delineated the permissible scope of such an inquiry. From these decisions there emerges the general rule that a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment.

"With respect to questions of jurisdiction over the person, this principal was unambiguously established in *Baldwin* v. *Iowa State Traveling Men's Assn.,* 283 U. S. 522."

P. 112-
P. 114 "Following the *Baldwin* case, this Court soon made clear in a series of decisions that the general rule is no different when the claim is made that the original forum did not have jurisdic-

tion over the subject matter. *Davis* v. *Davis,* 305 U. S. 32; *Stoll* v. *Gottlieb,* 305 U. S. 165; *Treinies* v. *Sunshine Mining Co.,* 308 U. S. 66; *Sherrer* v. *Sherrer,* 334 U. S. 343. In each of these cases the claim was made that a court, when asked to enforce the judgment of another forum, was free to retry the question of that forum's jurisdiction over the subject matter. In each case this Court held that since the question of subject-matter jurisdiction had been fully litigated in the original forum, the issue could not be retried in a subsequent action between the parties.

"In the *Davis* case it was held that the courts of the District of Columbia were required to give full faith and credit to a decree of absolute divorce rendered in Virginia, despite the claim that the Virginia court had lacked jurisdiction because the plaintiff in the Virginia proceedings had not been domiciled in that State. In the course of the opinion the Court stated:

> 'As to petitioner's domicil for divorce and his standing to invoke jurisdiction of the Virginia court, its finding that he was a bona fide resident of that State for the required time is binding upon respondent in the courts of the District. She may not say that he was not entitled to sue for divorce in the state court, for she appeared there and by plea put in issue his allegation as to domicil, introduced evidence to show it false, took exceptions to the commissioner's report, and sought

to have the court sustain them and uphold her plea. Plainly, the determination of the decree upon that point is effective for all purposes in this litigation.' 305 U. S., at 40.

"This doctrine of jurisdictional finality was applied even more unequivocally in *Treinies, supra,* involving title to personal property, and in *Sherrer, supra,* involving, like *Davis,* recognition of a foreign divorce decree. In *Treinies,* the rule was succinctly stated: 'One trial of an issue is enough. "The principles of *res judicata* apply to questions of jurisdiction as well as to other issues," as well to jurisdiction of the subject matter as of the parties.' 308 U. S., at 78.

"The reasons for such a rule are apparent. In the words of the Court's opinion in *Stoll* v. *Gottlieb, supra,* 'We see no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation. . . . Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined.

There is no reason to expect that the second decision will be more satisfactory than the first.' 305 U. S., at 172."

In applying the Full Faith and Credit clause the United States Supreme Court has emphasized and re-emphasized the rule that a judgment of a Court of another State must be given the same faith and credit to which the judgment is entitled in the State where it was rendered. A recent decision in which the Supreme Court applied this basic rule is *Aldrich* v. *Aldrich,* 378 U. S. 540 (1964).

It is not disputed that under Texas law the judgment of divorce is res judicata and entitled to faith and credit as between these parties. It is also undisputed that under Texas law the judgment is immune to collateral attack by either of the parties. Under the settled principles of law laid down by the United States Supreme Court the judgment must be accorded in Connecticut the same faith and credit to which it is entitled in the State of Texas.

Although the defendant in Texas has filed a motion for a new trial of the action in which the judgment was rendered, obviously that motion does not affect the binding force and effect of the judgment. To date no appeal from the judgment has been served or filed. If such an appeal should later be taken, the taking of the appeal would not deprive the judgment of the effect of res judicata and full faith and credit under Texas law. See the affidavit of William A. McKenzie, Esq., attorney for the plaintiff in the Texas action, sworn to January 11, 1966, submitted in opposition to plaintiff's motion for contempt and in sup-

port of the instant motion to dismiss or for an injunction or a stay.

II

It should also be pointed out that our Connecticut Courts are certainly alert to the principles laid down by the United States Supreme Court as stated by Chief Justice King in the recent case of *Perlstein* v. *Perlstein,* 152 Conn. 152 (1964), Advance Sheet of February, 1965, where the opinion of the Court repeatedly cited *Williams* v. *North Carolina,* 317 U. S. 287, and said (p. 157):

> "If domicil exists in a state, jurisdiction to affect the status of marriage exists in that state, regardless of whether the status does or does not fit into the classic concept of a 'res'. See *Williams* v. *North Carolina, supra.*"

And further (p. 159):

> "In the instant case the plaintiff's Connecticut domicil would give jurisdiction for a decree of divorce even upon constructive service on a non-resident defendant."

It is submitted that the binding effect of the judgment of divorce is not lessened by the ex parte temporary injunction which was obtained by the plaintiff on September 9, 1965, restraining the defendant from prosecuting the action in Texas. The plaintiff herein applied for that order after the summons and complaint in the Texas action were served upon her in Connecticut on September 2, 1965. It is significant

that in support of her application for the injunction order the plaintiff submitted a petition, verified on September 9, 1965, in which she described certain testimony given by defendant herein as to where he had been living and by clear implication argued that the Texas action for divorce was based upon an untrue allegation of residence. This plaintiff also alluded in said application to the expense involved in the defense of the Texas action and by inference led Judge MacDonald to believe that she did not intend to appeal and defend herself in the same. The injunction order was signed by Judge MacDonald in reliance upon said petition.

Subsequently plaintiff voluntarily elected to appear and submit to the jurisdiction of the Court in the Texas divorce action. By counsel she first challenged the jurisdiction of the Texas Court by a motion, which was overruled after a hearing at which testimony was taken. Later the plaintiff herein appeared in person and by counsel at the trial of the Texas divorce action, testified as a witness at such trial, and actually litigated all of the issues therein, including the issue of jurisdiction. The verdict of the jury and the judgment of the Court resolved all of the issues raised by the pleadings in said divorce action.

By voluntarily appearing in the Texas action and by actually litigating the issues therein there can be no doubt that the plaintiff waived the protection she sought by the injunction order of September 9, 1965 and that the judgment rendered at the conclusion of the Texas trial is binding upon this plaintiff. As the decisions above cited show, the Texas judgment had

the effect of dissolving the marital ties between the parties and rendered academic the ex parte injunction order of September 9, 1965. To contend in the face of the above facts that the ex parte temporary injunction continues to have operative effect is completely unrealistic and contrary to the law as laid down by the highest Court in the nation.

By instituting an action for a divorce in Texas the defendant herein exercised a right accorded to him by the laws of that State, where he had become and been a resident for the required period. If the plaintiff herein had remained aloof from the Texas action and relied upon the instant action and the injunction order therein, she would have remained free to challenge outside of Texas any judgment of divorce which might have been rendered in Texas. *Rice* v. *Rice,* 336 U. S. 674 (1949). Since she did not remain aloof but voluntarily appeared and litigated the issues in the Texas action, she enabled the Court there to render a judgment entitled to full faith and credit. *Sherrer* v. *Sherrer,* 334 U. S. 343 (1948); *Coe* v. *Coe,* 334 U. S. 378 (1948). In view of all of these circumstances it is submitted that to punish this defendant for litigating the issues of the Texas action with the plaintiff would constitute a violation of his fundamental rights of access to the courts of the State of his residence. cf. *Donovan* v. *City of Dallas,* 377 U.S. 408 (1964).

Even if it be assumed that the plaintiff's appearance and participation in the trial of the Texas action and the entry of the judgment of divorce after the trial had no effect on the ex parte injunction order, the claimed contempt arising from the prosecution of

the Texas action does not bar this defendant from his fundamental right to resist the instant action. The rule has long been settled that a Court may not deprive a defendant of his right to resist and defend as a punishment for his contempt in violating an order of the Court in the action. In the early case of *Hovey* v. *Elliott,* 167 U. S. 409, the United States Supreme Court held that denial of the right to defend as punishment for contempt deprives a party of property without due process of law and violates the Fourteenth Amendment to the Constitution. The doctrine of *Hovey* v. *Elliott* has often been applied in matrimonial proceedings. *Sibley* v. *Sibley,* 76 App. Div. 132, 78 N Y S 743 (1st Dept., 1902); *Zeitz* v. *Zeitz,* 263 App. Div. 825, 31 N Y S 2d 318 (2nd Dept., 1941). Clearly in opposing plaintiff's motion for contempt on the ground of the judgment of divorce the defendant is resisting and defending the action. It is submitted that in moving to dismiss this action or to enjoin or stay its prosecution the defendant is also, in effect, exercising his constitutional right to resist and defend the action.

III

If the Court determines that, in view of the pending motion for a new trial in the Texas action, the present action should not be entirely dismissed, then we submit that the Court could, and clearly should, enjoin the further prosecution of the action until the determination of such motion for new trial and of any appeal taken from the judgment in the interim and, in the event the judgment is not modified, vacated or re-

versed, then dismiss the instant action. The power of this Court to enjoin or stay the further prosecution of the instant action cannot be doubted.

In *Continental Credit Co.* v. *Ely,* 91 Conn., 553, 100 Atl. 434 (1917) the Supreme Court of Errors held that the Court in which an action is pending may, upon a proper factual showing, grant a motion to enjoin or stay the further prosecution of the action.

In *Bridgeport Hydraulic Co.* v. *Pearson,* 139 Conn. 186, 91 A. 2d 778 (1952) the Court affirmed an injunction against the prosecution of an action based on issues which had been adjudicated. The Court said (p. 195):

> "To prevent a multiplicity of actions, equity will enjoin further litigation of a cause of action which has already been adjudicated."

IV

In conclusion we wish to point out that the instant motion for an order dismissing this action or enjoining or staying its further prosecution is procedurally proper. The motion raises the issue of the jurisdiction of the Court to entertain this action for a separation, which is based on the existence of the relationship of husband and wife. It is our position that since the Texas judgment of divorce has dissolved the marital ties between the parties and restored them to the status of single persons, this Court obviously no longer has any statutory jurisdiction to entertain the instant action for a separation. There is no longer any subject matter jurisdiction. See *Smith* v. *Smith,* 150 Conn. 15, 23 (1962).

Appendix E

It is well settled that jurisdiction of the Court, including jurisdiction over the subject matter, may be raised at any time and that when the issue is raised, it must be determined.

In *Brown* v. *Cato,* 147 Conn. 418, 162 A. 2d 175 (1960), the Court said (p. 177):

> "Jurisdiction is the power in a court to hear and determine the cause of action presented to it. Jurisdiction must exist in three particulars: the subject matter of the case, the parties, and the process."

In *Greater Hartford Bridge Authority* v. *Russo,* 24 Conn. Sup. 182, 188 A. 2d 874 (1963), the Court stated (p. 876):

> "Jurisdiction is the power in a court to hear and determine the cause of action and must exist as to the parties, the process and the subject matter of the action."

And further (p. 876):

> "The question of jurisdiction, of course, may appear at any step in the proceedings and must be considered even if for the first time it is raised in a brief filed in the Supreme Court of Errors."

Moreover, by granting the present motion to dismiss or enjoin or stay prosecution the Court would be applying an overriding basic and fundamental principle of constitutional law, and the result would be unquestionably correct in substance, and in such a

situation any question of procedure is secondary and academic. See *Avonside, Inc. et al* v. *Zoning and Planning Comm. of Avon,* Conn. Law Journal issue, December 28, 1965, wherein Chief Justice King stated as follows:

> "In a cumbersome and irregular way, a basically correct result was finally achieved." *Scully* v. *Westfal,* 145 Conn. 648, 653.

For all the foregoing reasons the defendant prays that this action be dismissed or the prosecution of the same be enjoined or stayed.

Respectfully submitted

THE DEFENDANT

By HIRSCHBERG, PETTENGILL & STRONG
Hirschberg, Pettengill & Strong
His Attorneys

(*MTC*)

APPENDIX F

Memorandum Submitted to the Superior Court of Connecticut

SUPREME COURT

STATE OF CONNECTICUT

No. 118006

April 20, 1967

MARGUERITE LOVELETT NOWELL

vs.

AMES NOWELL

MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS DATED APRIL 5, 1967

(1) The appeal taken by the defendant to the Supreme Court is in all respects a duly authorized and proper appeal, and the instant motion of the plaintiff to dismiss said appeal is, like plaintiff's prior motions to dismiss the pending appeal, entirely without merit.

(2) By a motion dated July 1st, 1966, plaintiff moved to dismiss defendant's appeal herein on the grounds that he had failed to comply with certain orders directing the payment of alimony and counsel fees and had been found in contempt therefor, from all of

which orders and adjudications defendant was appealing by his appeal herein. That motion to dismiss was denied by the Supreme Court by an order dated October 19th, 1966.

(3) Plaintiff's present motion to dismiss is, in substance, the same as said motion to dismiss of July 1st, 1966, which this Court denied. Thus, the present motion, like the prior motion, is based upon (a) defendant's alleged failure to comply with an order from which he has duly appealed by filing a notice of intention to appeal and an amendment to his assignment of errors, both dated June 29th, 1966, and (b) a purported finding of contempt against defendant for failing to comply with such appealed order, from which finding defendant has duly appealed by filing an amendment to his assignment of errors, dated March 27th, 1967. All of the objections and grounds which called for the denial of said motion of July 1st, 1966, apply with full force to the instant motion to dismiss and not only justify but necessitate the denial of the same. Defendant submits in opposition to the instant motion, and urges that the Court read in opposition thereto, defendant's memorandum and supplemental memorandum filed in opposition to said motion of July 1st, 1966, which memoranda are dated August 19th and August 29th, 1966, respectively. In view of the above facts and circumstances the denial of the prior motion should be deemed controlling under the doctrine of the law of the case.

(4) By law defendant, like every other litigant, is entitled to appeal from, and to have reviewed, orders

and judgments rendered against him. This right of appeal is in substance and effect an extension or continuation of the right to defend and protect himself against the action which resulted in the appealed order or judgment. This defendant has duly exercised his right to appeal from the order allowing the alleged fee and the contempt order based thereon. The Supreme Court has repeatedly reviewed on appeal, and it is well settled that the Court will review on appeal, an order awarding a counsel fee, even where the only issue is whether the allowance was a proper exercise of discretion. See, e.g., *Saunders* v. *Saunders,* 140 Conn. 140, 145 (1953); *Hoenig* v. *Lubetkin,* 137 Conn. 516 (1951). In the instant case defendant's appeal is based on the additional meritorious grounds that the court below had no jurisdiction to make the award and that defendant was not, and is not, under any duty to pay counsel fees to this plaintiff, as discussed below. Indeed plaintiff does not question the regularity and legal propriety of the appeal.

(5) To dismiss defendant's appeal herein, which he has duly taken, as a penalty or punishment for his failure to comply with an order challenged by his appeal would deprive him of a fundamental right of defense and would be the equivalent of striking out a defendant's answer as such punishment. It has long been settled law that such action is improper and forbidden as a violation of constitutional rights. *Hovey* v. *Elliott,* 167 U.S. 409 (1897); *T. W. Warner Co.* v. *Andrews, et al.,* 5 Conn. Sup. 63, 67-68 (1937); *Brinkley* v. *Brinkley,* 47 N.Y. 40, 49-50 (1871). See, also, *Rethorst* v. *Rethorst,* 214 Md. 1, 133 A. 2d 101 (1957),

and other authorities cited in defendant's said supplemental memorandum dated August 29th, 1966. A dismissal of the appeal would also constitute a denial of full faith and credit to the judgment of divorce described below and deprive defendant of his right to have such judgment accorded such recognition.

(6) The baseless nature of the motion to dismiss also clearly appears from the indisputable fact that the parties were duly divorced by a final judgment of divorce entered in a court of competent jurisdiction of the State of Texas on December 22nd, 1965, *which judgment dissolved the marriage of the parties absolutely and restored them to the status of single persons.* In the action in which said judgment of divorce was rendered the present defendant was the plaintiff and the present plaintiff was the defendant; the present plaintiff duly appeared in the divorce action by counsel and in person, demanded a trial by jury, contested the issues on their merits, and was allowed, and this defendant paid, the sum of $6,000.00 as a fee for the attorneys who represented this plaintiff in such action; thereafter the plaintiff herein appealed from said judgment to the Court of Civil Appeals of Texas, which unanimously affirmed the judgment, *Nowell* v. *Nowell,* 408 S.W. 2d 550 (1966); and subsequently plaintiff petitioned the Supreme Court of Texas for a writ of error to review and reverse said judgment, which petition was overruled. *The plaintiff herein has never questioned the fundamental validity of said judgment of divorce.* Since the parties hereto ceased to be husband and wife upon the entry of said judgment of divorce on December

22nd, 1965, there no longer existed any legal basis or foundation for the present action for a legal separation, which was predicated on a subsisting marriage. The dissolution of the marriage necessarily wiped out the basis of the present suit, and the Superior Court no longer had any jurisdiction to entertain an action for a legal separation between these parties. *Smith* v. *Smith,* 150 Conn. 15, 23 (1962).

(7) It is of importance to note that in the action in which said judgment of divorce was rendered the jury, after an exhaustive trial of three and a half days, found that this plaintiff was guilty of "excesses, cruel treatment, or outrages" which rendered the further living together of the parties insupportable and that for a period of three years prior to the trial this plaintiff abandoned the defendant herein. *In other words, the jury concluded from the evidence that this plaintiff was the guilty party.* Upon the verdict of the jury the court rendered a judgment which provides that:

> "It is therefore, in accordance with said jury's findings as set out hereinabove and the findings of the Court, ORDERED, ADJUDGED AND DECREED by the Court that Ames Nowell, Plaintiff be and he is hereby granted a divorce from Marguerite Lovelett Nowell, Defendant, and that the bonds of matrimony heretofore existing between them be, and the same are hereby dissolved and the parties are respectively restored to the status of single persons."

Unquestionably said judgment of divorce was and is entitled to full faith and credit in the courts of Connecticut under the Constitution of the United States, Article IV, Section 1, and the implementing Act of Congress, 28 U.S.C. Sec. 1738. *Scherrer* v. *Scherrer,* 334 U.S. 343 (1943); *Coe* v. *Coe,* 334 U.S. 378 (1943); *Durfee* v. *Duke,* 375 U.S. 106 (1963); *Perlstein* v. *Perlstein,* 152 Conn. 152 (1964); *Frick* v. *Hartford Life Ins. Co.,* 98 Conn. 251 (1922).

Indeed the judgment of divorce was entitled to recognition and full faith and credit in the Superior Court in January, 1966, when an exemplified copy of the judgment was duly brought to the attention of that court. *Bank of America* v. *Wheeler,* 28 Conn. 433. See also *Huron Corp.* v. *Lincoln Co.,* 312 U.S. 183, at 188-189 (1941).

(8) The appeal herein has been made necessary by the conduct of the plaintiff in continuing to prosecute, and by the acts of the lower court in permitting plaintiff to continue to prosecute, this action for a purported legal separation in the face of undisputed documentary evidence of the rendition of said judgment of divorce which dissolved the marriage of the parties and removed the jurisdictional basis of the present action. Since this plaintiff duly appeared in said action for divorce, had her day in court therein on all of the issues, was allowed a counsel fee therein of $6,000.00 which this defendant paid, and was found and adjudged to be the party at fault, it is submitted that the court below had neither jurisdiction nor any justification to make an order requiring this defendant to finance plaintiff's persistent and willful attempts

to repudiate the judgment of absolute divorce rendered on her appearance and after her contest and that this defendant is neither legally nor morally obligated to pay fees to plaintiff for any such purpose.

(9) The appeal herein is clearly distinguishable from the usual appeal in an action for divorce or a legal separation in several material respects. First, prior to the entry of the purported judgment of legal separation, all marital ties between these parties had been dissolved absolutely by a judgment of divorce which the courts of Connecticut were and are powerless to reverse or modify or change. In other words, *the courts of this state cannot possibly restore these parties to the status of husband and wife.* Instead the courts are under a clear legal duty to recognize and give full faith and credit to the divorce. Second, this plaintiff was divorced by defendant for her marital wrongdoing, and since that finding was made in a contested trial, the courts of Connecticut cannot change the finding but must recognize it as res judicata and as entitled to full faith and credit.

(10) Since December 22nd, 1965, this plaintiff has not been, and she is not now, the wife of the defendant; since that date the defendant has not been, and he is not now, the husband of plaintiff; since said date the parties have been and are single persons; and the court had no jurisdiction or right whatsoever to direct the defendant to pay a counsel fee to this plaintiff.

(11) The allowance in question cannot be supported by Section 52-256a of the Conn. Gen. Statutes.

(12) By motion dated April 10th, 1967, the defendant has moved in the Supreme Court to vacate the purported judgment of separation and, in the alternative, to complete and perfect the record on appeal. Defendant incorporates by reference in opposition to the motion to dismiss the appeal, and respectfully urges the Court to read in opposition to such motion to dismiss, all papers filed in support of defendant's said motion.

The motion to dismiss is entirely without merit and should be denied in all respects.

Respectfully submitted,

THE APPELLANT

By HIRSCHBERG, PETTENGILL AND STRONG
Hirschberg, Pettengill and Strong
His Attorneys

APPENDIX G

Memorandum Submitted to the Supreme Court of Connecticut

SUPREME COURT

STATE OF CONNECTICUT

No. 118006

April 25, 1967

MARGUERITE LOVELETT NOWELL

vs.

AMES NOWELL

APPELLANT'S REPLY TO APPELLEE'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS DATED APRIL 13, 1967

The contentions asserted in plaintiff's memorandum, dated April 13th, 1967, filed in support of the present motion to dismiss the appeal herein, are a repetition, almost word for word, of the contentions which were asserted in plaintiff's memorandum of August 5th, 1966, filed in support of the earlier motion to dismiss of July 1, 1966, and which contentions this Court rejected in denying the earlier motion. In view of these facts we submit that the decision of this Court denying the earlier motion, is the law of the case on the present motion. *Kelly* v. *City of Waterbury;* 96 Conn. 494, 496 (1921); *State Bar Ass'n* v. *Conn. Bank &*

Trust Co., 146 Conn. 556, 564 (1959). See, also, *Hanson* v. *Hanson*, 258 Mass. 45, 154 N.E. 525 (1926); 5B C.J.S., *Appeal & Error*, p. 181; 21 C.J.S., *Courts*, pp. 330-333.

Although plaintiff's memorandum on the present motion thus contains neither new citations of authority nor new arguments, we will briefly summarize, for the convenience of the Court, the additional grounds which continue to justify the rejection of plaintiff's contentions.

(a) The defendant has duly appealed to this Court from, and is seeking a review of, each and all of the findings of contempt and orders mentioned in paragraph 1 to 7 of Part I of plaintiff's memorandum as well as the judgment of separation made below and also is bringing up for review the failure of the trial court to dismiss or stay the entire case, including said orders, on the ground that plaintiff ceased to be the wife of defendant on December 22nd, 1965. Obviously if the defendant's position with respect to said judgment, orders and findings of contempt is sustained, the result will be that he does not owe alimony or counsel fees in this proceeding and is not in contempt herein. In effect, plaintiff is again making the wholly untenable claim that defendant should accept and comply with the very orders which he appeals from and which he contends were erroneously made or should have been vacated or stayed, and pay sums of money which he contends not to be owing. It is thus apparent that plaintiff's position contradicts, and would undermine, the statutory and constitutional provisions entitling defendant to an appellate review of

the judgment, orders and findings of contempt in question and is inherently unsound.

(b) The motion to dismiss is addressed to the entire appeal. It is settled law that if any part of the appeal is sustainable, the motion must be denied. See *Keissling* v. *Keissling,* 134 Conn. 564 at page 565. Manifestly the defendant's right to a review of the lower court's refusal to accord full faith and credit to the judgment of divorce dissolving the marriage of these parties is absolute and may not be conditioned on his compliance with orders constituting the denial of full faith and credit.

(c) The law favors the determination of an appeal on its merits, and motions to dismiss an appeal prior to such determination are looked upon with disfavor. See 5 C.J.S. *Appeal and Error;* pp. 483-484, 487-490.

(d) A motion to dismiss an appeal must be made on a substantial legal ground recognized by statute or rule of court, and the contentions urged in support of the present motion are not so recognized. 5 C.J.S., *Appeal and Error,* pp. 401-402. The enunciations from Maltbie, *Conn. App. Procedure,* and the cases of *State* v. *Ward,* 134 Conn. 81, and *Wehrhane* v. *Peyton,* 134 Conn. 486, cited by plaintiff, are not pertinent or relevant. See defendant's memorandum of August 19th, 1966, pp. 4, where they are discussed and distinguished.

(e) The rule of construction known as ejusden generis clearly applies to the words "or any other ground" in Sec. 697 of the Practice Book and limits the quoted words to defects of the nature or character

specified in the section. See *State* v. *Certain Contraceptive Materials,* 126 Conn. 428, at pp. 430, 431, 433, 11 A. 2d 863 (1940), which is discussed in defendant's supplemental memorandum, dated August 29th, 1966, at p. 5. Thus, the words "or any other ground" refer to a defect of the same kind or class as those mentioned in Sec. 697, that is, a ground incident to the perfection of the appeal. Significantly plaintiff's memorandum does not cite any authority to the contrary, and it is submitted that no authority to the contrary exists.

(f) Connecticut does not have any statute or rule of case law entitling a woman validly divorced for her fault by the judgment of a sister State, to alimony or an allowance of legal fees from her former husband. Even if the law were otherwise, the proper remedy for the former husband's failure to pay such an allowance would be a motion for a stay. *Heard* v. *Heard,* 116 Conn. 638, 637.

In substance the instant motion to dismiss is a maneuver by which plaintiff is attempting to deprive defendant of his statutory and constitutional right to an appellate review of a judgment and orders erroneously made below. The motion is based upon unsound contentions and should be denied in all respects.

Respectfully submitted,

THE APPELLANT

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